PRIVITY OF CONTRACT.

PERHAPS the tradition in the elementary law of contracts most thoroughly grounded in the minds of law students is the general proposition that an agreement between A and B cannot be sued upon by C, even though C would be benefited by its performance. It always was, with Harvard law students at all events, an article of faith that rights founded on contract belong to the person who has stipulated for them; and that even the most express agreement of contracting parties would not confer any right of action on the contract upon one not a party thereto.[1] Indeed, it so happened that almost my first experience, as the callow practitioner, occurred in naïvely asking a New York Court to rule that a plaintiff, being privy neither to the promise made by the defendant to a third party, nor to the consideration given for it, has no standing in court, in seeking to enforce its performance. But the New York Court had different notions, and would rule no such thing. I was informed that the doctrine in that shape had long since been exploded, and that jurisprudence had advanced to a stage where the law operating on the act of the parties created the duty, established the privity, and implied the obligation on which the action is founded. And, upon further investigation, I actually found that no less learned a body of judges than the New York Court of Appeals had, in words at least, distinctly made this legal somersault, and had apparently succeeded in legislating the old principle out of existence.[2]

More than that, before it could recover itself sufficiently to appreciate what had happened, the departure was seized upon with avidity in other jurisdictions, and the heresy is to-day in some States well-established doctrine. The New York Courts, however, were soon put on the defensive, and, pitifully and apologetically squirming and shifting under the heavy burden, began to limit the new rule and hem it about, and to refuse to apply it to cases differing in any of their circumstances from precedents that were not *fac-similes*, until to-day its inventors would hardly recognize their creature. We find a never-ceasing pricking of conscience.

[1] This doctrine is not taught in the School at the present day.—EDS.

[2] Lawrence *v.* Fox, 20 N. Y. 268; Burr *v.* Beers, 24 N. Y. 178.

Thus, the new rule was early applied to the case of the assumption of a mortgage by an assignee from the owner of the equity of redemption, who had made the mortgage.[1]

But when it was attempted to apply the doctrine to the case of an assumption by the assignee of an owner of the equity, who was himself not liable for the payment of the mortgage, the attempt failed. "The Courts are not inclined to extend the doctrine of Lawrence *v.* Fox. . . . Judges have differed as to the principle upon which Lawrence *v.* Fox and kindred cases rest."[2]

So, too, where the owner of the equity of redemption makes a second mortgage, and this mortgagee assumes the payment of the first mortgage, the first mortgagee cannot avail himself of that assumption. "In Burr *v.* Beers the amount due upon the mortgage was reserved out of the purchase money, and left in the hands of the purchaser, upon his agreement with the vendor to apply it to the payment of the mortgage debt."[3]

The necessities of the Court of Appeals develop further distinctions. A retiring partner protects himself against the possible default of a copartner, on the latter's promise to assume the debts of the copartnership, by taking the guarantee of a third person. Held, not available by creditors of the copartnership. Merrill *v.* Green, 55 N.Y. 270, all in spite of Claflin *v.* Ostrom, 54 N.Y. 581. So, too, in the same volume of reports we have the following discrimination: —

Where a new partner assumes certain debts, unliquidated by the old partners, he is liable to these creditors of the former copartnership.[4]

But where the assets of a firm were transferred to A upon his promise to pay the firm's debts, one of which was a promissory note negotiated to plaintiff before maturity, it was held, that A, who was sued upon his promise to pay this note, could set off a claim owed to him by the previous holder of the note. "It would be a great extension of the doctrine of Lawrence *v.* Fox to hold that a promise to a debtor to pay his debt was a direct undertaking of the promisor with each of the persons successively who should acquire the interest of the original creditor, and this construction is not justified when there are no special words indicating that intention."[5]

[1] Burr *v.* Beers, 24 N.Y. 178.
[2] Freeman *v.* Turner, 69 N.Y. 280.
[3] Garnsey *v.* Rogers, 47 N.Y. 233.
[4] Arnold *v.* Nichols, 64 N.Y. 117.
[5] Barlow *v.* Myers, 64 N.Y. 41.

And it has been held that the obligation involved in the condition of a bond is not such a promise as is available to any one, not the obligee of the bond. "But it is not every promise made by one to another, from the performance of which a benefit may ensue to a third, which gives a right of action to such third person; he being neither privy to the contract nor to the consideration, the contract must be made for his benefit, as its object, and he must be the party intended to be benefited." [1]

Where A sold certain property to B, the proceeds of which were to be paid to C, and a warrant of attachment was served upon B, in an action to recover a claim against A, and before these proceeds had been distributed, it was held that the sheriff was entitled to recover from B. It reads like a bit of irony to find Judge James using the words: "Privity of contract was once deemed of some importance in testing the right of one who sought to enforce an agreement. . . . Can it be doubted that the original creditor could maintain an action for the original debt?" [2]

And where a defendant, holding under a warranty deed, by which he had assumed the mortgage made by his grantor, was evicted by paramount title, the covenant of assumption was held not enforceable by the mortgagee, notwithstanding Lawrence *v.* Fox and Burr *v.* Beers. "But I know of no authority to support the proposition, that a person not a party to the promise, but for whose benefit the promise is made, can maintain an action to enforce the promise, where the promise is void, as between the promisor and the promisee, for fraud, or want of consideration, or failure of consideration. It would be strange, I think, if such an adjudication should be found." [3]

But is not the argument with Judge Earl, who, in a dissenting opinion, protests against these artificial distinctions? "The notion that the right of the third party to enforce such a promise depends solely upon the doctrine of equitable subrogation, as defined in King *v.* Whitely (10 Paige, 465) and Trotter *v.* Hughes (12 N.Y. 74), has been thoroughly exploded in Burr *v.* Beers, Coster *v.* The Mayor, Thorp *v.* The Keokuk Coal Co., and many other cases."

It is no wonder that an occasional Court of original jurisdiction is carried to curious extremes in trying to logically pursue these refinements. So late as January last we were told that where a

[1] Simson *v.* Brown, 68 N.Y. 355.

[2] Punning *v.* Leavitt, 85 N.Y. 30.

[3] Kelly *v.* Roberts, 40 N.Y. 432.

parent had delivered to the child a written agreement made for its benefit with a third person, the contracting parties, because of such delivery, had lost all control over the agreement, for the purpose either of alteration or rescission.[1]

It is with great diffidence that I undertake to formulate these various authorities; but perhaps the final outcome of the New York cases might be stated to be that where A makes to B, for a consideration that is legal and that does not fail, a promise to do something, which promise is legally enforceable by B, and obtained by him in order to benefit C, C can enforce against A the performance of his promise, unless B sooner obtains compensation for its breach, or releases the promisor; but that third persons are no longer permitted to sue on contracts, upon the ground simply that, by their performance, they, the third persons, would be incidentally benefited.

"The general rule is, that when two persons, for a consideration sufficient as between themselves, covenant to do some act, which if done would incidentally result in the benefit of a mere stranger, that stranger has not a right to enforce the covenant, although one of the contracting parties might enforce it as against the other."[2]

But, even amended and purified, the existing New York rule represents an anomaly, and in casting about for the origin of the apostasy one comes naturally upon Sutton *v.* Poole, Ventris, 318, as the entering wedge. And yet this venerable precedent was *sui generis*, in that the plaintiff, who claimed the benefit of the contract, was related by blood to one of the contracting parties, who himself had no personal interest in its performance, and therefore might reasonably be deemed to have made the contract solely for the benefit of the plaintiff. And, by way of apology for that decision, it should undoubtedly be remembered, that at the time of its rendition it had not yet been clearly established that love and affection were not a uniformly sufficient consideration. And it is not certain that the earlier authorities, of the nature of Sutton *v.* Poole, were not influenced by the fact that *assumpsit*, being an action on the case, was one in the nature of tort, in cases of which, of course, privity was unnecessary.[3]

And the distinction between covenants and simple contracts is

[1] Knowles *v.* Erwin, 26 W. Dig. 37.

[2] Railroad Co. *v.* Curtiss, 80 N. Y. 219.

[3] Dicey on Parties, 85.

clearly recognized by those Courts that accept the doctrine to which exception is taken.[1]

I think that it will be found that most of the cases, in all jurisdictions, in which a stranger to the contract has been permitted to enforce it, and however broad the *ground* of decision given, are distinguishable on their circumstances and divisible into the following heads, — *a.* Novation; *b.* Agency; *c.* Action of money had and received; *d.* Negligence; *e.* Trusts; *f.* Nearness of relationship; *g.* Privity of estate.

a. *Novation.* — This, of course, refers to the substitution of a new obligation for an old one, which is *thereby* extinguished. Strictly, indeed, in that case the plaintiff is not a stranger to the agreement, regarding the whole transaction as a single one. A legal consideration actually proceeds from plaintiff to defendant (see Bank *v.* Grand Lodge, 98 U. S. 123), in which, by-the-by, an admirable criticism of the Lawrence *v.* Fox principle is stated by Justice Strong: "But where a debt clearly exists from one person to another, a promise by a third person to pay such debt, being primarily for the benefit of the original debtor, and to relieve him from his liability to pay it (there being no novation), he has a right of action against the promisor for his own indemnity, and, if the original creditor can also sue, the promisor would be liable to two separate actions, and therefore the rule is that the original creditor cannot sue. His case is not an exception from the general rule that privity of contract is required."

b. *Agency.* — A contract made by an agent on behalf and for the benefit of his principal may, of course, be ratified and enforced by the principal. The promisee is regarded as the agent, though in form the principal.[2]

c. *Negligence.* — Such actions, even where sounding in contract, are really founded upon the defendant's tort. Independently of the express obligation, a defendant's negligence, resulting in injury to the plaintiff, who has not contributed thereto, is actionable. So that, *e.g.*, where a servant, travelling with his master, who applied and paid for his transportation, lost his portmanteau through the negligence of the railway company, the servant was permitted to recover its value from the company.[3]

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[1] See cases *supra.*

[2] See opinions, Johnson, C. J., and Denio, J., in Lawrence *v.* Fox, *supra.*

[3] Marshall *v.* York, 11 C. B. 655.

d. *Money Had and Received.* — This is now generally admitted to be in the nature of an equitable action, so that any party may sue another for money in his possession to which said party, in view of all the circumstances of the case, is equitably (*ex equo et bono*) entitled.[1]

e. *Trusts.*— Where, under an agreement, assets have come into the promisor's hands or control, in trust, express or implied, to pay the plaintiff's claim, the payment can be enforced by the plaintiff; that is, the trustee can be compelled to execute the trust.[2]

f. *Nearness of Relationship.*— These cases are made to rest upon the ground that the person obtaining the promise, and from whom the consideration moves, intends it as a gift to the one in whose favor the stipulation reads. They seem to proceed upon some such theory as that if the promise be not for the benefit of the plaintiff it is not for that of any one, and that, as a question of policy, the one person interested in the performance of an agreement should be permitted to enforce it. It comes very near to being an exception to prove the rule.[3]

g. *Privity of Estate.* — Where the lessee assigns the lease to the defendant upon his agreement to pay the stipulated rent to the lessor, the defendant is liable to the lessor on this, as indeed on all covenants that run with the land. And yet even here the limitation is made that such liability continues only so long as the defendant remains the legal assignee, making it appear the more clearly that the liability arises from the privity of estate, and not from any privity of contract.[4]

It must not be supposed that the Harvard Law School Alumni have been so faithless to the tradition of their Alma Mater as to supinely acquiesce in the legal monstrosity born of the *dictum* in Lawrence *v.* Fox. In a recent case, in which a debtor had absolutely transferred all his property to the defendant, one of his creditors, upon the defendant's promise to pay all the debts, we succeeded in sustaining a demurrer to the complaint of one of those creditors. Judge Wallace threw himself heroically into the breach in Austin *v.* Seligman, 18 Fed. Rep. 519. But, shortly after, the State Courts expressly refused to follow him in a substantially similar case, and our hearts were again made to yearn for the flesh-

[1] Bull *v.* Boughton, 2 Denio, 21.
[2] Garnsey *v.* Rogers, *supra.*
[3] See King *v.* Whitely, 10 Paige, 465; Knowles *v.* Erwin, *supra.*
[4] See Walton *v.* Crosby, 14 Wend. 64; Mellen *v.* Whipple, 1 Gray, 317.

pots of Cambridge. Perhaps we shall get relief from the Field Code, which begins to loom up with terrible distinctness, and already poses as the layman's panacea and the lawyer's dragon. Some of us believe that it will prove a boomerang. Even the Statute of Frauds, it will be remembered, has required interpretation. But I digress, and forget that my subject is a question of privity, while with this code it can never be a question of consideration.

Jesse W. Lilienthal.

NEW YORK.

THE RESPONSIBILITIES OF AMERICAN LAWYERS.

IT is one of the popular fallacies of the present day that the responsibility for the state of the law rests entirely with the legislative branch of the government. In reality, this responsibility is in every country shared to a great extent by the legal profession, and the slow development of the law, which results from the writings of jurists, the judgments of courts, and the customary practice of lawyers, is, perhaps, more irresistible, because less noticed, than the violent changes produced by direct legislation. This is especially true in countries where the decisions rendered in actual cases furnish the main source of legal authority. It is not, however, the general responsibility of lawyers in lands where the common law prevails that I wish to consider. It is the more restricted but more weighty duty which is laid upon the legal profession in America by the peculiar nature of our system of government.

The immense power given to the courts by our constitutions is so familiar to us that remark upon it has become commonplace, and for that very reason we sometimes fail to realize its true significance as fully as does the foreigner to whom it is a subject of astonishment. We are in the habit of speaking of our political system as a government by the people, carried on by means of three coördinate branches,— the Executive, the Legislative, and the Judicial; but when these expressions are examined carefully, it is evident that they are misleading, and, perhaps, inaccurate, at least in the